

**SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES  
OF AMERICA, ON BEHALF OF THE DEPARTMENT OF THE INTERIOR,  
THROUGH THE NATIONAL PARK SERVICE, AMERY WIRTSHAFTER  
AND THE M/V DIAMOND GIRL**

**I. Introduction**

1. The United States of America, on behalf of the U.S. Department of the Interior, National Park Service ("NPS"), and Dr. Amery Wirtshafter on behalf of himself and the M/V DIAMOND GIRL ("Dr. Wirtshafter"), (hereinafter referred to collectively as the "Parties") enter into this Settlement Agreement to settle, without litigation, the United States' civil claims under the Park System Resources Protection Act ("Act"), 16 U.S.C. §§ 19jj *et seq.*, for response costs and damages for injuries to park system resources that occurred in Biscayne National Park as a result of the grounding of the M/V DIAMOND GIRL on April 21, 2000 (the "Incident").

2. Under the Act, each person and/or instrumentality that destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury. The execution of this Agreement shall not constitute, nor is it in any way, an admission by Dr. Wirtshafter of any liability.

**II. Parties Bound**

3. The provisions of this Settlement Agreement shall apply to and be binding upon Dr. Wirtshafter and his heirs, successors and assigns, upon the M/V DIAMOND GIRL and upon the United States, on behalf of the NPS.

**III. Definitions**

4. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in the Act shall have the meaning assigned to them in the Act.

#### **IV. Payments**

5. Within thirty (30) days after the effective date of this Settlement Agreement, Dr. Wirtshafter shall pay to the NPS the amount of two hundred and eighty-five thousand dollars (\$285,000.00). The parties recognize that Allstate Floridian Insurance Company may make this payment on behalf of Dr. Wirtshafter, and that such payment shall be considered payment by Dr. Wirtshafter.

6. a. Payment of the amount set forth in Paragraph 5 shall be in the form of a check payable to the U.S. Department of the Interior - DOI and shall be sent directly to:

Department of the Interior  
NBC/Division of Financial Management Services  
Branch of Accounting Operations  
Mail Stop D-2777  
7401 W. Mansfield Avenue  
Lakewood, CO 80235

The following information must be included with the check:

Account Number: 14X5198 (NRDAR)  
Name of case: Dr. Amery Wirtshafter and the DIAMOND GIRL  
Location of Site: Biscayne National Park  
Name of Paying Party: Dr. Amery Wirtshafter

A copy of the check and any accompanying correspondence shall be sent to DOI and DOJ at the addresses set forth in Paragraph 18 of this Agreement.

7. a. If Dr. Wirtshafter executes and returns this Settlement Agreement to DOI within fifteen (15) days of the date of his receipt of this Settlement Agreement, and payment pursuant to this Section IV is timely, no interest shall accrue;

b. If Dr. Wirtshafter executes and returns this Settlement Agreement to DOI within fifteen (15) days of the date of his receipt of this Settlement Agreement, but payment pursuant to this Section IV is not timely, interest shall be calculated, at the rate set forth in

Paragraph 7.d. of this Agreement, from the date thirty (30) days after the effective date of this Settlement Agreement until the date of payment; and

c. If Dr. Wirtshafter executes and returns this Settlement Agreement to DOI later than fifteen (15) days after his receipt of this Settlement Agreement, interest shall be calculated, at the rate set forth in Paragraph 7.d. of this Agreement, commencing on the fifteenth day after receipt by Dr. Wirtshafter of this Settlement Agreement and continue until the date of payment.

d. Interest on payments due pursuant to Paragraph 5 hereof shall be at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

8. If Dr. Wirtshafter fails to make payment under this Section IV by the required due date, Dr. Wirtshafter shall be in violation of this Settlement Agreement and shall pay a stipulated penalty, in addition to the interest required by Paragraph 7.c. of this Agreement, of \$1,000 per day that such payment is late. The stipulated penalties are due and payable within thirty (30) days of the date of the demand for payment of the penalties by the United States. All payments under this Paragraph 8 shall be identified as "stipulated penalties" and shall be made to the United States by certified check made payable to "U.S. Department of Justice." Such payment shall reference this Settlement Agreement and Dr. Wirtshafter's name and address and be mailed to:

Financial Litigation Unit  
United States Attorney's Office  
Southern District of Florida  
99 N.E. 4<sup>th</sup> Street  
Miami, FL 33132

At the time of payment, notice of such payment shall be sent to DOI and DOJ at the addresses

set forth in Paragraph 18 of this Agreement. Penalties shall accrue as provided in this Paragraph 8 regardless of whether the United States has notified Dr. Wirtshafter of the violation or made a demand for payment but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

9. Payments made under Paragraph 8 shall be in addition to any other remedies or sanctions available to the United States by virtue of Dr. Wirtshafter's failure to comply with the requirements of this Settlement Agreement. Notwithstanding any other provision of this Section, the United States may, in its own unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement.

10. Dr. Wirtshafter and the M/V DIAMOND GIRL shall be liable for attorneys' fees and costs incurred by the United States to collect any amount due under this Settlement Agreement that is not timely paid.

**V. Covenant Not to Sue and Reservation of Rights  
by the United States**

11. In consideration of the payments to be made by Dr. Wirtshafter, the United States, on behalf of the National Park Service, covenants not to sue Dr. Wirtshafter and the M/V DIAMOND GIRL for (i) response costs or damages for injury to, destruction of, loss of, or loss of use of, park system resources arising from the Incident, including damage assessment and monitoring costs associated with the Incident; and (ii) other than as set forth in Section IV above, for costs, attorneys' fees, other fees, or expenses incurred by the United States to recover such response costs and damages in connection with the Incident. This covenant not to sue is not

effective until, and is conditioned upon, complete and satisfactory performance by Dr.

Wirtshafter of his obligations under this Settlement Agreement.

12. Notwithstanding any other provision of this Settlement Agreement, the United States reserves, and this Settlement Agreement is without prejudice to, any claims not included in Paragraph 11, including, but not limited to:

i) claims based upon a failure of Dr. Wirtshafter to meet a requirement of this Settlement Agreement;

ii) civil fines and penalties;

iii) criminal liability;

iv) claims for response costs or damages not arising from the Incident that the United States may have under applicable law.

**VI. Covenant Not to Sue by Dr. Wirtshafter and the M/V DIAMOND GIRL**

13. Dr. Wirtshafter on behalf of himself and the M/V DIAMOND GIRL, hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, or its employees, agents, experts or contractors, for

i) any claim pursuant to admiralty law, or any claim pursuant to any other provisions of law, for payments made or costs incurred pursuant to this Settlement Agreement;

ii) any claims arising out of any response activities undertaken by the United States in connection with the Incident;

iii) any claims for costs, attorneys' fees, other fees, or expenses incurred in connection with this Settlement Agreement.

14. In any subsequent administrative or judicial proceeding initiated by the United States

relating to the Incident, neither Dr. Wirtshafter nor the M/V DIAMOND GIRL shall assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been settled in this Settlement Agreement; provided, however, that nothing in this Section affects the enforceability of the covenants not to sue set forth in Section V herein.

#### **VII. Public Notice Requirements**

15. The Parties acknowledge that final approval by the United States and the effectiveness of this Settlement Agreement are subject to public notice and comment for a period of thirty (30) days after publication of notice of the Agreement in the Federal Register. The Parties further acknowledge that the United States reserves the right to withdraw or withhold its consent if the comments regarding this Agreement disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper, or inadequate.

#### **VIII. Effective Date**

16. The effective date of this Settlement Agreement shall be the date upon which the United States issues written notice to Dr. Wirtshafter that the public comment period pursuant to Section VII has closed and that comments received, if any, do not require modification of or United States withdrawal from this Settlement Agreement.

17. If the United States withholds or withdraws its consent, then this Settlement Agreement will be considered null and void.

#### **IX. Notices**

18. Except as otherwise set forth in this Agreement, whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to

another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing.

As to the Department of the Interior ("DOI")

Trish Cortelyou-Hamilton  
Attorney-Adviser  
USDOJ, Regional Solicitor's Office  
75 Spring Street, SW  
Room 304  
Atlanta, GA 30303

Department of the Interior  
Natural Resource Damage Assessment & Restoration Program  
Attn. Restoration Fund Manager  
1849 C Street, NW  
Mail Stop 4449  
Washington, DC 20240

Superintendent  
Biscayne National Park  
9700 S.W. 328 St.  
Homestead, FL 33033

As to the Department of Justice ("DOJ")

Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, DC 20044

As to Amery Wirtshafter and the M/V DIAMOND GIRL

Donna M. Wilson-Sampson, Esq.  
Powers, McNalis, Torres & Teebagy  
1601 Belvedere Road  
P.O. Box 21289  
West Palm Beach, FL 33416-1289

#### **X. Signatories**

19. Each undersigned representative of Dr. Wirtshafter on behalf of himself and the M/V DIAMOND GIRL, and the United States on behalf of the National Park Service, certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind such party to this document.

#### **XI. Entire Agreement**

20. This Agreement constitutes the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in the Agreement and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise constitutes any part of this Agreement or the settlement it represents, nor shall it be used in construing the terms of this Agreement.

#### **XII. Modification**

21. The terms of this Agreement may be modified only by a subsequent written agreement signed by the Parties.

#### **XIII. Execution**

22. This Agreement may be executed in counterparts, each of which shall constitute an original, and all of which shall constitute one and the same instrument.



SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA ON  
BEHALF OF THE DEPARTMENT OF THE INTERIOR, THROUGH THE NATIONAL  
PARK SERVICE, Dr. AMERY WIRTSHAFTER AND THE M/V DIAMOND GIRL.

For the United States of America

On behalf of the Department of the Interior, National Park Service

Date: \_\_\_\_\_

\_\_\_\_\_  
ELLEN M. MAHAN  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice


SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA ON  
BEHALF OF THE DEPARTMENT OF THE INTERIOR, THROUGH THE NATIONAL  
PARK SERVICE, Dr. AMERY WIRTSHAFTER AND THE M/V DIAMOND GIRL

For Amery Wirtshafter

On behalf of Dr. Amery Wirtshafter

Date: \_\_\_\_\_

10/5/07

  
AMERY WIRTSHAFTER  
13050 Biscayne Bay Ter.  
Miami, Florida 33181

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA ON  
BEHALF OF THE DEPARTMENT OF THE INTERIOR, THROUGH THE  
NATIONAL PARK SERVICE, Dr. AMERY WIRTSHAFTER AND THE M/V  
DIAMOND GIRL.

For the M/V DIAMOND GIRL

On behalf of the M/V DIAMOND GIRL

Date: 10/5/07

AMERY WIRTSHAFTER  
13050 Biscayne Bay Ter.  
Miami, Florida 33181